



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lucas Place, Ltd.--Reconsideration

File: B-238008.3

Date: September 4, 1990

J. Michael Dorsey, Esq., McDowell, Rice & Smith, for the protester.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Prior decision denying protest is affirmed where protester's request demonstrates that it was not prejudiced by agency's misleading discussions and acceptance of possibly noncompliant offer.
2. Untimely allegation will not be considered under the significant issue exception to the bid protest timeliness requirements where the issue raised is not one of widespread interest to the procurement community.

DECISION

Lucas Place, Ltd. requests reconsideration of our decision in Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398, in which we denied in part and dismissed in part Lucas' protest against the award of a contract to Gateway Complex Incorporated under solicitation for offers (SFO) No. XM089221, issued by the General Services Administration (GSA), for 56,000 square feet of office space to house the regional office of the Department of Housing and Urban Development (HUD).

We deny the request for reconsideration.

Award under the SFO essentially was to be made to the acceptable low priced offeror. The SFO provided that the evaluation of offers would be on the basis of the annual

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price per square foot, to which GSA would make a present value price evaluation by reducing the prices offered to a composite annual square foot price in accordance with a stated formula. The SFO also provided that if the cost of utilities was not included as part of the rental consideration, the offeror must specify which utilities were excluded from the rent and provide:

"[S]eparate meters for utilities to be paid for by GSA. The [offeror] shall furnish the contracting officer, prior to occupancy by the government, written verification of the meter numbers and certification that these meters measure government usage only. Proration is not permissible."

As a result of the agency's present value evaluation of offerors' rental costs, including evaluation of lump-sum costs, telephone costs, and discounts for historic preference, GSA determined that Gateway was the low offeror at \$6.95 per net usable square foot, while Lucas was the third-low offeror at \$7.88 per net usable square foot.

In the initial protest, Lucas argued that GSA had misled it regarding the separate metering of utilities by informing it during discussions that its initial proposal was not acceptable because it provided for separate metering of a portion of a utility (electricity) and that this was not allowed by the SFO. Lucas claimed that GSA had advised it to bid utilities, including electricity, by either including all of the utility costs in the base rent or by excluding all of it from rent and providing separate metering. On the other hand, GSA had made award to Gateway even though its proposal provided for partial metering of the electrical utility. Lucas argued that it only provided for separate metering after GSA's advice and that its best and final offer (BAFO) price would have been \$6.94, or 1 cent less than Gateway's evaluated BAFO rent, if Lucas had been allowed to offer partial exclusion of the electric utility.^{1/}

We found that GSA did mislead Lucas during discussions. However, we also determined that Lucas was not prejudiced by GSA's misleading discussions, since it would not have been the low offeror under any circumstances. This was so because the record established that Lucas' calculations, in

^{1/} Lucas supported this argument with a detailed calculation of all the elements of the evaluated price.

support of what its price would have been but for the misleading discussions, provided an incorrect estimate for the cost of services to be provided by the government. When Lucas' BAFO price was recalculated using the proper estimate (and still using all of Lucas' other cost figures--which were disputed by GSA), Lucas' evaluated price was \$7.49 per net usable square foot, or 54 cents higher than Gateway's evaluated price.

In its request for reconsideration, Lucas argues that our Office incorrectly characterized GSA's improper actions as the failure to conduct meaningful discussions with Lucas. Lucas contends that we should have construed GSA's action of instructing Lucas and all offerors but Gateway during discussions that separate metering of utilities was required as a de facto amendment to the solicitation. Lucas asserts that it was therefore improper for GSA to accept Gateway's proposal without having provided Lucas and the other offerors the opportunity to compete on an equal basis. Thus, Lucas argues that the objective of its protest was not to determine Lucas to be the low offeror and award it the contract, but to demonstrate that the process was so flawed that GSA should be required to terminate the contract award and resolicit. Lucas argues that it was not required to establish with certainty that it would have received the award but merely that it would have been competitive with the awardee. Therefore, Lucas argues that we should have sustained the protest because it produced evidence to show that its price would have been substantially lower, if it had been allowed to compete on the same basis as Gateway.

Contrary to Lucas' contention in its reconsideration request, Lucas clearly complained in the protest that it was misled in discussions and it did not focus on the contention that the agency's acceptance of Gateway's utility metering approach was in violation of the de facto amendment that prohibited this approach. In any case, prejudice is an essential element of any viable protest. IDG Architects, 68 Comp. Gen. 683 (1989), 89-2 CPD ¶ 255; Empire State Medical, Scientific and Educ. Found., Inc., B-238012, Mar. 29, 1990, 90-1 CPD ¶ 340. Thus, we will only sustain

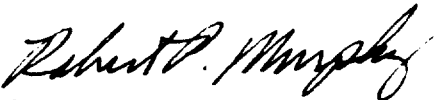
protests where an agency accepts a noncompliant offer and the protester is prejudiced. See Essex Electro Eng'rs, Inc., B-238207; B-238207.2, May 1, 1990, 90-1 CPD ¶ 438; Connaught Laboratories, Inc., B-235793, Oct. 11, 1989, 89-2 CPD ¶ 337. Therefore, even assuming Gateway's proposal could be considered noncompliant with the separate metering requirement (although this was not expressly incorporated into the solicitation), the record would have to indicate that Lucas was prejudiced by GSA's acceptance of Gateway's noncompliant offer in order for us to sustain the protest.

In this case, while Lucas is correct in asserting that it need not prove prejudice with any certainty, see B.K. Dynamics, Inc.--Recon., 67 Comp. Gen. 264 (1988), 88-1 CPD ¶ 165, Lucas' calculations of what price it would have offered if it could have proposed on the same basis as Gateway demonstrates that it was not prejudiced. In this regard, as indicated above, Lucas' detailed calculations included an incorrect figure for electrical service provided by the government. That is, while Lucas' price is based on the presumption that this service costs 60 cents per net usable square foot, the actual cost of the services, which reflected the cost of utilities provided by the Kansas City Power & Light Company, should have been \$1.37 per net usable square foot. As indicated in our prior decision, this calculation was performed by GSA during the procurement, not in response to the protest, although this figure was only provided to Lucas by GSA in response to Lucas' calculations. Contrary to Lucas' contention in the reconsideration request, Lucas had and took the opportunity to respond to various GSA contentions after it had been supplied with this information, but did not dispute GSA's analysis of the electrical service figures and how they affected Lucas' calculations. Indeed, our review confirms the correctness of GSA's analysis.

In the prior decision, Lucas also argued that Gateway's building did not meet certain fire and safety standards. We dismissed this basis of protest as untimely under our Bid Protest Regulations since Lucas knew or should have known of this basis of protest on December 8, 1989, yet Lucas did not raise the issue until February 27, 1990. Lucas argues that the allegation raises an issue which our Office should consider under the significant issue exception to our timeliness requirements, see 4 C.F.R. § 21.2(b) (1990), because the allegation concerns the safety of federal employees and GSA's stated policy is to not waive fire and safety requirements. See American Management Co., B-228279; B-228280, Jan. 15, 1988, 88-1 CPD ¶ 38.

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the procurement community which have not been considered on the merits by this Office in a previous decision. Id. Lucas' protest, which only concerns GSA's fire and safety evaluation under this one procurement, does not meet this standard. In any event, GSA reported that Gateway had contractually agreed to meet all applicable GSA fire safety standards and local codes.

We deny the request for reconsideration.


for James F. Hinchman
General Counsel